In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 829

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is reported at 365 F. 2d 121.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1966. A petition for rehearing was denied on September 7, 1966. The petition for a writ of certiorari was filed on December 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's predecessor in title acquired no interest

in the public domain because his certificate entitling him to a patent was properly cancelled.

STATEMENT

This suit was brought by the United States to abate a trespass on its lands located within the boundaries of the Shawnee National Forest in Jackson County, Illinois. Petitioner, Central Illinois Public Service Company, has constructed and maintains electric power transmission lines across the national forest, claiming a right of way to a strip of land approximately 100 feet in width and approximately 1,320 feet in length. Petitioner claims under mesne conveyances from one John Nikles, who entered the land, allegedly a part of the public domain, on February 4, 1860, and later, on November 12, 1860, was issued a certificate entitling him to a patent. The official records of the Bureau of Land Management, Department of the Interior, show that on May 13, 1857, a prior entryman, Hiram Walker, entered the land as the assignee of a military warrant for bounty land issued to Isabella Bowman. The land office cancelled Nikles' certificate on December 27, 1860, since it was in conflict with the earlier Walker entry. The Walker entry was subsequently cancelled by the land office on April 26, 1862, when it was found by a court that the warrant Walker possessed had been stolen from its original owner (Pet. App. 7a–9a, 25a–32a).

The United States claims that its legal title to this property was never divested and the land, being unpatented and undisposed public land, was officially withdrawn from all forms of entry and set aside as

part of the Shawnee National Forest by Presidential Proclamation No. 2357 on September 6, 1939 (4 Fed. Reg. 3860, 54 Stat. (Pt. 2) 2649). The two courts below sustained the government's claim.

ARGUMENT

The decisions below are correct and not in conflict with decisions of any other courts. Hence, further review by this Court is not warranted. The undisputed evidence conclusively shows that the Nikles' entry was in conflict with the then outstanding Walker entry. The law is well established that an entry on public land which is *prima facie* valid, even though subsequently declared void, segregates the land from the public domain and prevents a second entryman from obtaining any interest in it until the prior entry has been set aside by the land department. *Hastings, Etc., Railroad Co.* v. *Whitney,* 132 U.S. 357, 361; *Hodges* v. *Colcord,* 193 U.S. 192, 196; *McMichael* v. *Murphy,* 197 U.S. 304, 311; *James* v. *Germania Iron Co.,* 107 Fed. 597, 603, 610 (C.A. 8). Accordingly, the land in issue here was not subject to entry at the time of the Nikles' entry and the land office was fully authorized to correct the error of its local registers and to cancel the Nikles' certificate. *Cornelius* v. *Kessel,* 128 U.S. 456, 461; *Orchard* v. *Alexander,* 157 U.S. 372, 382; *Boesche* v. *Udall,* 373 U.S. 472, 479.

In view of the clearly conflicting entries on the records, which Nikles never denied, there was no

question to be resolved by a hearing as urged by petitioner (Pet. 13). Moreover, there is no evidence showing that Nikles, who had notice of the cancellation (Pet. App. 17a–18a), ever asked for a hearing or that he was ever denied one by the land office.

Petitioner's contention that Walker relinquished the land in favor of Nikles (Pet. 19–32) is without merit. The official records reveal no relinquishment by Walker, no use of a relinquishment by Nikles and no acknowledgment of a relinquishment by the land office.[1] Moreover, the letters which petitioner claims constitute Walker's relinquishment (Pet. 8, 9; Pet. App. 9a–10a)[2] do not purport to divest Walker of any right, title or interest he might have had in the land by virtue of his prior entry. The letters contain no words expressing Walker's intent to sell, grant or convey any interest in the property to Nikles. The authorities cited by petitioner (Pet. 20–23) are based in each case on a valid, completed withdrawal or relinquishment; they are not in point here.

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[1] The records show that the true owner of the land warrant satisfied the interest it conveyed when he used it to settle on land in Nebraska.

[2] The letter dated February 22, 1860 (Pet. 8–9; Pet. App. 9a), was tendered by petitioner as newly discovered evidence of a relinquishment, in its petition for rehearing (Pet. 32). In addition to not meeting the above argument, the petition for rehearing and its purported new evidence (Pet. 4a–12a) did not comply with Rule 60(b)(2), F.R. Civ. P., in that it presented no justification for failure to discover the evidence at the time of trial or even on appeal. The evidence was on file in the National Archives of the United States, was available at the time of trial and could have been found by the exercise of due diligence.

The presumption of a lost record or grant relied on by petitioner (Pet. 26–32) is clearly rebutted by the official record on the tract book showing that Nikles' entry was cancelled on December 27, 1860. The records of the Department of the Interior further show that Nikles admitted receiving notice of that cancellation (Pet. App. 17a–18a). Petitioner's presumption is also rebutted by the Presidential Proclamation of 1939, *supra*, p. 3. Its publication in the Federal Register and Statutes at Large—15 years prior to petitioner's purchase—put all on legal notice of the withdrawal from entry of unpatented lands within the described national forest. Act of July 26, 1935, Sec. 7, 49 Stat. 502, 44 U.S.C. 307; *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–385.

Petitioner's contention that the United States did not assert any right or claim to the land (Pet. 31) is without significance. The law is clear that laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409; *United States* v. *State of California,* 332 U.S. 19, 39–40.

The critical factor in this case is that the official records of the Bureau of Land Management disclose that no patent to the land has even been issued to anyone. There is no evidence that Nikles or any of his successors in possession ever perfected valid title after the Walker cancellation, even though there was a procedure for doing so. Moreover, a title search in 1954, when petitioner purportedly purchased the easement,

should have, or did, reveal the absence of a patent and, thus, a serious defect in the chain of title. That defect, taken together with the Presidential Proclamation of 1939 (*supra*, p. 3), published in the Federal Register and Statutes at Large, which showed by plat that this land was part of the national forest, should have put petitioner on notice of the government's continuing interest in the property. Hence, the United States has never been divested of its legal or equitable title to the property. *Brown* v. *Hitchcock*, 173 U.S. 473, 476; *Cameron* v. *United States*, 252 U.S. 450, 460; *Best* v. *Humboldt Mining Co.*, 371 U.S. 334.

CONCLUSION

For the reasons given, we respectfully submit that the petition for a writ of certiorari should be denied.

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